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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LORENA ROJAS et al., Plaintiffs and Appellants, v. EDGAR AKOPYAN et al., Defendants and Appellants.	B195218 (Los Angeles County Super. Ct. No. BC325595)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ralph W. Dau, Judge. Affirmed.

Gary Rand & Suzanne E. Rand-Lewis, for Plaintiffs and Appellants.

McKenna Long & Aldridge and Margaret I. Johnson, for Defendant and Appellant Gateway Management Services, Ltd.

Stone & Hiles and David L. Schaffer, for Defendants and Appellants Edgar Akopyan and Akopyan Trading Company, Inc.

Plaintiffs Lorena Rojas and Roberto Villapando appeal from the judgment following trial of their claims involving the refusal of defendant Gateway Management Services, Inc. to pay to repair or replace the transmission in a car Rojas bought from defendants Edgar Akopyan and Akopyan Trading Company, Inc. doing business as CARS4U (collectively "Akopyan"). Defendants Gateway Management Services, Inc., Edgar Akopyan, and Akopyan Trading Company cross-appeal. We affirm.

FACTS AND PROCEEDINGS

Appellant Lorena Rojas bought a used car with more than 78,000 miles on it from Akopyan's used car dealership. Because Rojas does not speak English, appellant Roberto Villapando helped her negotiate the purchase. When Rojas bought her car, she paid an extra $695 for a "Premium 2000 Plus Warranty Program" offered by Gateway Management Services, Inc. Under the warranty program (which appellants describe as an "insurance policy"), Rojas received drive train and transmission fluids from Gateway and added them to her car. In return for using its fluids, Gateway guaranteed the car's transmission against any breakdown for an additional 100,000 miles or five years. Three months after Rojas bought the car, its transmission was in good working condition. Unfortunately, one month later the transmission failed. Gateway refused, however, to pay to repair or replace the transmission.

In December 2004, appellants sued Akopyan and Gateway for refusing to honor Gateway's warranty. Appellants alleged causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory fraud, fraudulent concealment, negligence, intentional infliction of emotional distress, violation of the Consumers Legal Remedies Act (Civ. Code, § 1750), and unfair competition (Bus. & Prof. Code, § 17200).

Appellants tried to a jury all their causes of action except for violation of the Consumers Legal Remedies Act and unfair competition. (The court tried the latter two causes of action in a subsequent bench trial.) At the end of appellants' case-in-chief, Akopyan and Gateway moved on multiple grounds for nonsuit. Following argument,

the court granted a fair measure of their motion. The court entered nonsuit on appellants' cause of action for intentional infliction of emotional distress because appellants had offered no evidence of outrageous conduct by defendants in their sale of the car and later refusal to pay for repairing the transmission. It entered nonsuit on appellant's cause of action for negligence because they had failed to show violation by defendants of any extra-contractual duty. It entered nonsuit for Gateway on fraudulent concealment because appellants offered no evidence of a misrepresentation by Gateway about its warranty program. The court entered nonsuit for Gateway on promissory fraud because appellants needed to show more than Gateway's mere purported breach of the warranty. The court entered nonsuit on appellant Villapando's cause of action for breach of contract because he was not a party to the automobile sales agreement or Gateway warranty. The court also granted nonsuit on appellant Rojas's cause of action against Akopyan for breach of the automobile sales contract because she had failed to establish the enforceability of a purported oral reduction of the interest rate charged to finance her purchase of the car.

The remnants of appellants' lawsuit were submitted to the jury after the close of evidence and argument. The jury found Akopyan defrauded Rojas, apparently by misrepresenting the car's condition when he sold it to her. The jury also found Akopyan had not defrauded Villapando. The jury awarded Rojas $5,795 in damages for Akopyan's misrepresentations. The jury also found Gateway had breached its warranty with Rojas, and awarded her $2,956.80 in damages. Furthermore, the jury found Gateway breached its duty of good faith and fair dealing, for which it awarded Rojas $50,000. And finally, the jury found Gateway acted with malice, oppression, or fraud toward Rojas and awarded her $225,000 in punitive damages.

Following the jury's verdict, the court tried appellants' causes of action for unfair competition and violation of the Consumers Legal Remedies Act. The court thereafter dismissed both causes of action. It found Villapando lacked standing to sue Gateway and Akopyan because he had not been a consumer involved in purchasing either Rojas's car or the transmission warranty. The court further found as to both

appellants that their cause of action under the Consumers Legal Remedies Act failed because they had not provided jurisdictionally required statutory notice before suing defendants. (Civ. Code, § 1782, subd. (a)(1) & (2).) And finally, the court found appellants failed to show any conduct by defendants that supported a claim for unfair competition. The court thereafter entered its judgment incorporating its rulings on defendants' motions for nonsuit, the jury's verdict, and its bench trial determinations.

Gateway moved for a new trial on multiple grounds. The court conditionally granted the motion. It found the jury's award of $50,000 to Rojas for her "emotional distress, humiliation, and inconvenience" from Gateway's bad faith was excessive. The court reduced the award to $25,000 and ordered a new trial if Rojas rejected the remittitur of her award. The court also found the evidence did not support the $225,000 punitive damages award against Gateway because appellants had not offered evidence of Gateway's financial condition. The court thus ordered a new trial of those damages. Appellants filed a notice of appeal, and defendants cross-appealed.

DISCUSSION

A. APPEAL BY LORENA ROJAS AND ROBERTO VILLAPANDO

Nonsuits Properly Granted

1. *Prefatory Observation*

In reviewing the trial court's granting of nonsuit, we accept as true appellants' evidence in support of their causes of action, and disregard conflicts in the evidence. Appellants' evidence must be substantial, meaning it would permit a rational trier of fact to find in appellants' favor those facts needed to establish each element of a particular cause of action. (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 262-263; *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 531.) It follows that an appellant who challenges entry of nonsuit must discuss the evidence in the record supporting each nonsuited cause of action, and show how that evidence establishes the elements of each cause of action. While appellants'

references to the evidence need not be copious, exhaustive, or repetitive, they must be more than passing, cursory, and conclusory. A bald assertion of error will not do. But bare assertions is largely all that appellants offer in urging us to reverse the trial court's entry of nonsuit.

2. *Breach of Contract Against Akopyan*

Appellants contend the trial court erred in granting Akopyan's motion for nonsuit of their cause of action against him alleging breach of the car sales agreement. The sum total of the evidence they cite in support of their cause of action is the following: "Plaintiffs presented evidence that the parties agreed that the interest rate for Plaintiffs' financing of the vehicle was to be eighteen percent (18%), but that Plaintiffs could come back and reduce the rate to about eight percent (8%) after six months. (3RT430:26-431:11)" The citation to the record at reporters transcript pages 430 to 431 contained within that statement reflects that the statement accurately paraphrases the testimony from those pages – but it does little more. Most important, it is not substantial evidence that would permit a rational trier of fact to find breach of the sale agreement.

First, the paraphrased statement does not address the court's finding of no evidence that Villapando was a party to the sales agreement. Second, it does not address that the sales agreement was an integrated writing, meaning it contained all the terms of the contract, and could only be modified in writing. The contract provided:

> "HOW THIS CONTRACT CAN BE CHANGED. This contract contains the entire agreement between you and us relating to this contract. Any change to the contract must be in writing and both you and we must sign it. No oral changes are binding."

Third, it did not address that the sales agreement did not contain a term allowing a reduction in interest of the sort appellants suggest. Fourth, appellants presented no evidence of an enforceable oral modification. (Civ. Code, § 1698, subd. (c) ["Unless the contract otherwise expressly provides, a contract in writing may be modified by an

oral agreement supported by new consideration."].) And, fifth and finally, appellants offered no evidence that they returned to Akopyan's dealership to request a reduction in the interest rate. Given all of the foregoing, no rational jury could have concluded based on the evidence appellants cite that Akopyan breached the sales agreement. The trial court therefore did not err in granting Akopyan's nonsuit on that claim.

3. *Negligence Against Akopyan and Gateway*

Appellants contend the trial court erred in granting respondents' motion for nonsuit of appellants' negligence cause of action. In support, appellants cite evidence that Gateway neglected to provide a written denial of Rojas's warranty claim even though Gateway's internal procedures required written denials. Appellants also cite evidence that Akopyan did not adequately explain Gateway's engine care products and warranty to appellants, although they do not describe the purported inadequacies Akopyan neglected to highlight for them. From these two evidentiary points, appellants argue the following (and no more):

> "Testimony at trial established that Defendant Gateway failed to follow its own policies and procedures with regard to the denial of Plaintiffs' claim (2RT247:20-251:11), and that neither the warranty contract nor the products associated therewith were properly explained to Plaintiffs (4RT516:1-520:6). This testimony was sufficient for the jury to infer that Defendants had breached their duty of due care owed to Plaintiffs . . . ."

Appellants offer no argument on appeal supported by authority discussing the elements of negligence in the context of the present dispute. They do not, for example, discuss the components of Gateway's or Akopyan's legal duties involving, for example, Gateway's "policies and procedures" or their obligation to explain Gateway's products. Without an articulated duty, one cannot establish breach of a duty of due care. The court did not err in granting respondents' nonsuit of appellants' cause of action for negligence.

4. *Intentional Infliction of Emotional Distress Against Akopyan and Gateway*

Appellants contend the trial court erred in granting respondents' motion for nonsuit of their cause of action for intentional infliction of emotional distress. In support of the cause of action, appellants' opening brief cites Rojas's testimony that she could not afford to repair her car's transmission when it failed, making her "feel like I was robbed because I paid for something that I never received." Their reply brief adds that she suffered distress while her car's transmission awaited repair because she could not drive her daughter to school and her newborn to doctors' appointments.

Intentional infliction of emotional distress involves conduct beyond what one could reasonably be expected to tolerate in a civilized society. (*Cervantez v. J. C. Penney Co.* (1979) 24 Cal.3d 579, 593; *Schild v. Rubin* (1991) 232 Cal.App.3d 755, 763.) Appellants cite authority that civilized society does not tolerate robbery. (*McGough v. University of San Francisco* (1989) 214 Cal.App.3d 1577, 1587.) Even though we recognize that Rojas was offended by what happened, a difference exists, however, between being robbed and "feeling" like one has been robbed. Beyond her comparison of herself to a robbery victim, Rojas presents no argument to support her claim for intentional infliction of emotional distress other than to state that "Like their claim for Breach of Contract, Plaintiffs' presented ample evidence of emotional distress to the jury. (4RT532:1-8, 527:28-528:2)" The trial court did nor err in granting respondents' motion for nonsuit.

5. *Appellants' Causes of Action for Fraud Against Gateway*

Appellants alleged two causes of action against Gateway: promissory fraud, and concealment or misrepresentation. Appellants numbered promissory fraud as their complaint's third cause of action, and designated the cause of action for concealment or misrepresentation as the complaint's fourth. The court's order granting nonsuit on both fraud claims mistakenly switched the numbering of the two causes of action,

incorrectly designating promissory fraud as the fourth cause of action, and concealment or misrepresentation as the third. For the court's mistake, appellants' brief states, "The Trial Court's ruling with regards to Plaintiffs' Fraud claims fails to properly specify the claims it applies to and is therefore nonsensical." Other than its unnecessary aspersion of the sensibility of the court's ruling, appellants' argument consists of only the bald assertion that "[T]he trial testimony established that CARS4U and Akopyan as agents of Gateway, made representations to Plaintiffs that the Gateway warranty, which representations were false when made. (3RT488:9-16; 4RT516:6-24)" The citations to the record contained within the foregoing assertion reveal that Akopyan told appellants that Gateway's warranty was a "good thing to buy" and that the warranty would protect the car's transmission after the dealership's one-month warranty offered by Akopyan expired. Nothing in the foregoing establishes elements of fraud by Gateway, and thus the trial court did not err in granting Gateway's motion for nonsuit.

6. *New Trial of Bad Faith and Punitive Damages*

Gateway moved for a new trial on multiple grounds. The court granted the motion in two respects. First, it concluded the jury's award to Rojas of $50,000 in bad faith damages was excessive. The court thus conditionally granted Gateway a new trial on those damages unless Rojas accepted the court's remittitur of bad faith damages to $25,000. Rojas did not accept the remittitur. Second, the court concluded the $225,000 punitive damages award was error because appellants had not offered during trial evidence of Gateway's current financial condition. The court therefore ordered a new trial of punitive damages.

Appellants contend the court erred in several ways in granting Gateway a new trial. First, appellants contend Gateway's motion for new trial was untimely, and therefore the court should have denied it as a matter of law. Appellants are mistaken. After giving notice of its intent to move for a new trial, Gateway had 10 days to serve and file its supporting memorandum of points and authorities. (Cal. Rules of Court,

rule 3.1600 formerly rule 236.5.) Gateway filed its notice of intent on October 10, 2006. The proof of service for Gateway's memorandum of points and authorities was dated October 20, 2006, a Friday. Appellants received the memorandum two business days later on Tuesday, October 24, 2006. The envelope in which appellants received the memorandum, however, did not have a postage meter stamp date or postage cancellation date. Code of Civil Procedure section 1013a, subdivision (3) states that service of a document is presumed invalid if the cancellation date or postage meter date is more than one day later than the accompanying proof of service indicates was the date the document was put in the mail. Because the envelope bore no postage date, appellants appear to contend Gateway cannot satisfy Code of Civil Procedure section 1013a, subdivision (3), which requires the postage cancellation date be within one day of the date on the affidavit of service. From the absent postage cancellation date, appellants argue service must be deemed invalid. From the purportedly invalid service, appellants argue the motion must be deemed untimely. And from the purportedly untimely service, appellants conclude the court should have denied the motion without a hearing. Appellants cite no case law, however, applying Code of Civil Procedure section 1013a to the post office's oversight in not cancelling postage in the novel way that they urge, and we decline to do so.

Appellants also contend the court erred in granting Gateway a new trial on damages for bad faith because substantial evidence supported the jury's award of $50,000. We review an order granting a new trial for abuse of discretion. Appellants do not frame their argument using the correct standard of review. Instead, they argue the evidence of bad faith as if the bad faith award were being attacked for insufficiency of the evidence, which is not the case. By not discussing how, or even whether, the trial court abused its discretion by granting a new trial on damages for bad faith, appellants have waived their contention on appeal.

Appellants also contend the trial court erred in granting a new trial on punitive damages. The trial court granted a new trial because, among other reasons, appellants did not offer any evidence of Gateway's financial condition current as of the time of

trial in June 2006. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 111.) The court noted appellants offered evidence of Gateway's revenue in 2001 and projected revenues for 2002 through 2004. A company's revenue is only half the picture, however, of its financial health because it omits information of the company's expenses and liabilities. (*Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1065.) Appellants contend the evidence they presented was sufficient to support punitive damages, but their contention does not answer the court's finding that the record contained no evidence of current financial condition. By not addressing the basis of the trial court's ruling, appellants fail to show the court erred in granting a new trial.

Appellants try to blame Gateway and the court for appellants' failure to offer evidence of Gateway's current financial condition. Two days before final argument in the jury trial, appellants tried in the courtroom to serve counsel for Gateway with a subpoena for Gateways' financial records. Counsel refused to accept service on Gateway's behalf, and the court refused to enforce the subpoena because appellants had not served it on Gateway. Although plainly displeased with the court, appellants cite no authority that the court erred.

7. *Judgment for Respondents Under Consumers Legal Remedies Act*

Appellants sued respondents for violation of the Consumers Legal Remedies Act. (Civ. Code, § 1770.) After a bench trial, the court entered judgment against appellants because they had not given respondents the jurisdictionally required statutory notice before suing them for violating the act. As an additional, independent reason for its judgment, the court also noted that appellant Villapando did not have standing to sue respondents because he was not a consumer of either the car or warranty. Appellants contend the court erred. They are mistaken.

First, appellants contend Villapando was a consumer in regard to the car and warranty. The act defines a "consumer" as an "individual who seeks or acquires, by

purchase or lease, any goods or services for personal, family, or household purposes."[1] (Civ. Code, § 1761, subd. (d).) Rojas bought the car, assisted in her purchase with a gift of $4,000 in cash that Villapando gave her. Apparently because Rojas does not speak English well, Villapando found the car for her and negotiated the sales contract. He also submitted her claim to Gateway when the car's transmission failed. Appellants cite no authority that Villapando's assistance to Rojas made him a consumer under the act, the purpose of which is "to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." (Civ. Code, § 1760.) Lacking legal authority, appellants cite a dictionary definition of the statute's word "seek" as meaning "to try to acquire or gain." Appellants reason Villapando was thus a consumer because he sought the car on Rojas's behalf. Relying on the dictionary's definition, appellants state "The fact that Plaintiff Rojas bought the car and signed the Gateway application, and that Mr. Villapando provided the $4,000 as a gift to Ms. Rojas does not warrant a ruling that Mr. Villapando was not a consumer." To the contrary, it does.

Appellants also contend the court erred in entering judgment against them for not giving statutory notice of their claim before they filed suit. The Consumers Legal Remedies Act requires a consumer to give notice to a prospective defendant by certified or registered mail at least 30 days before filing suit. (Civ. Code, § 1782.)[2]

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[1] During oral argument, appellants' counsel argued Villapando was a consumer in buying the car because he "participated" in the transaction. The statutory definition of consumer does not include the word "participate." (Civ. Code, § 1761, subd. (d).) Counsel's assertion was sloppy use of language that counsel should avoid.

[2] Section 1782 ["Thirty days or more prior to the commencement of an action for damages pursuant to this title, the consumer shall do the following: [¶] (1) Notify the person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770. [¶] (2) Demand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770. [¶] The notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place

The notice must give the defendant an opportunity to remedy the consumer's purported grievance. The statute requires the consumer's strict compliance with the notice provisions. (*Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 40.)[3] The court found no evidence appellants had given such notice. Appellants point to settlement discussion involving Gateway, the dealer, and appellants after appellants filed a claim for the car's transmission under the Gateway policy. Appellant's filing with Gateway a document they do not describe further is not, however, the same as certified or registered mail. The court therefore did not err.

Appellants also contend the court erred in entering judgment against them after the bench trial because earlier in the proceedings the court had denied respondents' motion for nonsuit on appellants' CRLA cause of action. Appellants argue the court's denial of nonsuit barred the court from changing its mind to later enter judgment for respondents after a trial. In support, appellants cite *Tiffany Productions of California v. Superior Court* (1933) 131 Cal.App. 729, 732, a case involving a court's reconsideration of the amount of an undertaking for a writ of attachment, and whether res judicata applies. (*Id.,* at pp. 730-732.) That decision has nothing to do with denial of a motion for nonsuit and a later judgment dismissing the same cause of action after a trial.

Finally, appellants appear to contend the trial court was obligated to find in their favor because the jury had found Akopyan had defrauded Rojas. Appellants present no authority for the proposition that a jury's verdict on a fraud cause of action compels a particular verdict on a claim under the Consumers Legal Remedies Act.

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where the transaction occurred or to the person's principal place of business within California."].

[3] Appellants cite *Fidelity Sound System, Inc. v. American Bonding Co.* (1978) 85 Cal.App.3d Supp. 13 to the contrary, but it is inapposite because it involved service of an undefined "document" under a statute involving materials liens on public works projects.

And even if such authority existed, they have failed to present a coherent argument supported by citations to the record setting out such an argument.

8. *Unfair Competition Under Business and Professions Code Section 17200*

Appellants alleged a cause of action for unfair competition by Gateway and Akopyan. Business and Professions Code section 17200 defines "unfair competition" to "mean and include any unlawful, unfair or fraudulent business act or practice . . . ." The trial court ruled Villapando lacked standing to pursue an unfair competition claim because he was not a consumer of the car or warranty. And as to both appellants, the court stated "Just what defendants did that gives rise to a claim under section 17200 was never stated by plaintiffs, nor did plaintiffs cite any case law to the court holding that anything similar to the evidence in this case to be actionable under section 17200." The court therefore entered judgment against appellants on their cause of action alleging violation of section 17200.

According to appellants, Gateway violated the act by engaging in the insurance business without registering with the state of California. Gateway further violated the act by not disclosing to its customers that it was not registered to sell insurance. And finally, it violated the act by portraying its warranty of its engine and transmission fluids as a warranty instead of as insurance. Their contentions fail.

First, appellants do not discuss Villapando's lack of standing under the unfair competition law. Second, appellants do not address the court's observation that appellants cited no legal authority to support their claim. Appellants do not discuss the elements of a cause of action for violation of the statute, and they do not try to tie those elements (which they do not discuss) to the evidence in the case. The only decision they cite is *Committee On Children's Television, Inc. v. General Foods Corp.* **(**1983) 35 Cal.3d 197, 209-211, which stands for the proposition that deceptive advertising constitutes unfair competition. Appellants do not explain, however, how Gateway's purportedly inaccurate portrayal of itself as providing a warranty of its

transmission additives, instead of being an insurer, injured appellants. Moreover, appellants do not articulate how Gateway's self-characterization of its line of business played into the question of whether Gateway wrongfully denied appellants' claim for the costs to repair Rojas's transmission.

Finally, as with appellants' claim under the Consumers Legal Remedies Act, appellants contend the court erred in entering judgment against them after the bench trial because the court had previously denied respondents' motion for nonsuit of the same cause of action. As we have already rejected this line of reasoning, it bears no further discussion.

9. *Motion to Tax Costs*

Respondents prevailed in every claim Villapando alleged against them. As prevailing parties, Akoypan moved to recover $6,318 in costs against Villapando and Gateway moved to recover $2,744. For each of them, about half the costs they sought from Villapando were deposition costs. Appellants moved to tax the costs respondents sought from Villapando. They argued respondents' motion did not separate the costs they incurred in defending themselves against Villapando's claims from the costs they incurred in defending themselves against Rojas. Thus, according to appellants, some portion of respondents' costs bill included non-recoverable costs respondents had incurred in defending themselves against Rojas. According to appellants, such mingled costs included filing, the cost of serving trial subpoenas, and reporter's fees for taking Rojas's deposition. The court denied appellants' motion to tax costs in its entirety. Rejecting appellants' argument that respondents were attempting to recover from Villapando costs they incurred in defending against Rojas, the court stated: "As to plaintiff Villapando's argument that defendants have the burden to show costs incurred separately as to each plaintiff, the court concludes that each joined cause retains its separate identity."

Appellants contend the court erred, but they fail to support their contention with a cogent argument supported by citation to the record and legal authorities. Moreover

they do not discuss the court's conclusion that their causes of action had remained separate and the court's implicit attendant finding that respondents had demonstrated the reasonableness of their costs in defending against their separate causes of action. The extent of their argument is the following: "Defendants failed to establish either the reasonableness or necessity of the challenged costs. Notwithstanding, the Trial Court erroneously denied Plaintiffs' motions to tax costs in their entirety and awarded Defendants all claimed costs. (9AA2598) Clearly, the Trial Court's ruling must be reversed." Such a cursory argument does not demonstrate the trial court erred, and thus their contention fails.

B. AKOPYAN CROSS-APPEAL

1. *Sufficiency of Evidence of Fraud*

Akopyan contends substantial evidence did not support the jury's verdict against him on Rojas's cause of action for fraud. Rojas's reply brief does not discuss Akopyan's contention. Rojas does, however, discuss Akopyan's additional contention that the trial court erred in denying his motion for nonsuit on Rojas's fraud cause of action. If one reads her reply brief generously, one may glean from her discussion of Akopyan's motion for nonsuit the following as evidence she believes to be sufficient to support the jury's fraud verdict against Akopyan: (1) Akopyan told Villapando that Rojas's car "was a good car" and "in good condition"[4]; (2) Akopyan told Villapando that Rojas could return six months after buying the car and ask for a reduction in the interest rate she was paying on her car loan; (3) Akopyan told Villapando that Gateway's warranty was "a good thing to buy"; and (4) the Gateway form that Rojas completed at Akopyan's dealership thinking it was a warranty was only an application

[4] To show fraud, Rojas must prove, among other things, that Akopyan believed the car was not in good condition when he sold it to her. Three months after Rojas bought the car, her independent mechanic found no problem with the transmission, making it hard to envision her proving Akopyan knowingly misled her, but because this is a disputed fact, the jury was free to find otherwise.

for a warranty, but Rojas left the dealership believing the warranty was already in effect.[5] Whether the warranty was, in fact, "a good thing to buy," and worth the $695 that Rojas paid for it because it protected Rojas if her car broke down were disputed facts. Implicit in the jury's verdict that Akopyan had defrauded Rojas was the jury's determination that the warranty was not worth what Rojas paid and that Akopyan misled Rojas into buying the warranty. Accordingly, sufficient evidence supported the jury's verdict.

C. GATEWAY CROSS-APPEAL

1. *Trial Court Properly Submitted Issue of Punitive Damages to Jury*

The jury awarded Rojas $225,000 in punitive damages against Gateway for breach of the covenant of good faith and fair dealing. Following the jury's award, Gateway moved for a new trial. In support of its motion, Gateway argued Rojas had not offered evidence of its then-current financial condition. (*Adams v. Murakami*, *supra*, 54 Cal.3d at p. 111; *Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 681 [evidence for punitive damages award insufficient as a matter of law if defendant's then-current financial condition not included]; *Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919.) The court agreed, and correctly granted the motion. (See, *supra*, A(6) "New Trial of Bad Faith and Punitive Damages".)

In its cross-appeal, Gateway requests an outright reversal of the punitive damages award on the ground the warranty was not an insurance policy. Alone among all types of contracts, only an insurance policy supports a punitive damages award for

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[5] In fact, the warranty did not bind Gateway until 90 days after the customer received transmission fluids and had an outside service company add the fluids to the engine and transmission. Moreover, the application Rojas received stated the warranty provided no coverage for its first 90 days. (*Hadland v. N.N. Investors Life Ins. Co.* (1994) 24 Cal.App.4th 1578, 1586-1589 [policyholder cannot show justifiable reliance needed for fraudulent misrepresentation of insurance policy if policyholder received copy of policy that accurately stated policy terms].)

its bad faith breach. (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 43-44.) We reject Gateway's request because former Insurance Code section 116, subdivision (b) in effect when Rojas bought Gateway's lubricants rendered Gateway's warranty an insurance policy. Former Insurance Code section 116 stated:

> "Automobile insurance also includes any contract of warranty . . . that promises service, maintenance, parts replacement, repair, money, or any other indemnity in event of loss of or damage to a motor vehicle or any part thereof from any cause, including . . . breakage if made by a warrantor or guarantor who or which as such is doing an insurance business."[6]

Gateway's "Premium 2000 Plus Warranty Program" guaranteeing the transmission of Rojas's car against any breakdown for an additional 5 years or 100,000 miles if she used Gateway's transmission and engine fluids is such a policy. Gateway cites several other hallmarks of insurance in support of its contention that the warranty was not insurance, but those general principles must yield to the specific statute. (*Stone Street Capital, LLC v. California State Lottery Com'n.* (2008) 165 Cal.App.4th 109, 122; *Medical Bd of California v. Superior Court* (2001) 88 Cal.App.4th 1001, 1017; Code Civ. Proc., § 1859.) For example, Gateway notes the "principal object" of its transaction with Rojas was to provide transmission and engine fluids, with the warranty being secondary to the transaction. Gateway also argues that its warranty was not a mechanism to spread risk among all similarly situated buyers of its fluids, risk-spreading being an important indicia of insurance. In addition, Gateway notes the trial court noted during a hearing on jury instructions that Gateway did not sell its policy as insurance, and appellants did not accept it as insurance. These general tests

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6 In 2004, an amendment to Insurance Code section 116.5 displaced subdivision (b) of section 116 as it related to engine lubricants. The amendment stated, "An express warranty warranting a motor vehicle lubricant, treatment, fluid, or additive that covers incidental or consequential damage resulting from a failure of the lubricant, treatment, fluid, or additive, shall constitute automobile insurance, unless all of the following requirements are met . . . ."

do not, however, overcome the Legislature's specific pronouncement in Insurance Code section 116 making a warranty for engine lubricants an insurance policy.

Gateway contends the court erred in finding the safe-harbor provision of Insurance Code section 116.5 did not exempt its warranty from being treated as an insurance policy. The safe-harbor provision applies to sellers of engine lubricants and ensures that a seller who satisfies certain criteria does not become the buyer's insurer merely by guaranteeing the lubricants. At the time Rojas bought Gateway's engine lubricants in 2003, the provision had several requirements, one of which was the written warranty disclose the year Gateway began doing business in California. (Former Ins. Code, § 116.5, subd. (c)(2) [Stats.1999, c. 238].)[7] Gateway's warranty stated the company's "national marketing program was established in 1997." Interpreting the statute, the court found Gateway's language did not satisfy the requirement to declare when Gateway started doing business in California. Gateway asserts the court erred because Gateway's " 'nationwide' [program] by definition includes California." Gateway cites no authority for its proposition that "nationwide" necessarily means all 50 states, which is the proposition's unstated premise.

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[7] Former Insurance Code section 116.5 stated: "[A]n agreement promising repair or replacement of a motor vehicle or part thereof subsequent to a mechanical or electrical breakdown, where the repair or replacement is at either no cost or a reduced cost for the agreement holder, shall not constitute automobile insurance if the obligor is a manufacturer of motor vehicle lubricants, treatments, fluids, or additives, provided that all of the following apply: [¶] (a) The agreement covers only parts directly in contact with the lubricant, treatment, fluid, or additive that is manufactured by the obligor, or parts mechanically connected to those parts. [¶] (b) No separately stated consideration is paid for the agreement by the agreement holder. [¶] (c) The agreement is in writing and includes all of the following: [¶] (1) A disclosure in 10-point type or larger that reads as follows: "This agreement is a product warranty and is not insurance. It is not subject to state insurance laws but is subject to state laws concerning warranties. You must use the product as instructed in order to receive the benefit of the warranty." [¶] (2) A disclosure of the year in which the obligor began doing business in this state. [¶] (3) A toll-free telephone number for the agreement holder to call should there be a question or problem about the lubricant, treatment, fluids, or additives or the warranty."

Moreover, we find the proposition dubious because one can fairly describe as nationwide any number of businesses or enterprises, say, for example, major league baseball, even though they do not have outposts in every state.

2. *Jury Instruction Limiting Damages*

The court instructed the jury that Rojas could not recover for Gateway's breach of contract greater damages than would place her where she would have been if she and Gateway had fully performed their contract. (See Civ. Code, § 3358 [". . . No person can recover a greater amount in damages for breach of an obligation than he could have gained by the full performance thereof by both sides."].) Gateway interprets the value of its full performance under its policy as $2,000, which is the policy limit under its warranty. The jury awarded Rojas $2,956.80 for Gateway's breach of contract.

Gateway's contention is unavailing because it ignores that incidental damages occur when a party breaches a contract that would not have arisen if the party had performed the contract. To make a party whole following a breach, the party must receive compensation for those incidental damages. The court instructed the jury that Rojas claimed damages for the cost of towing her car when the transmission failed, storing it, paying to repair the transmission, and from the loss of her use of the car while it awaited repair. Given Gateway's policy limit of $2,000 to repair a transmission, Rojas's damages award of a little less than $3,000 for repair and towing, storage, and loss of use appears reasonably calculated to put Rojas where she would have been if Gateway had performed under its contract.

3. *Exclusion of Vehicle Inspection Report*

Gateway ordered an inspection of Rojas's car after she submitted her claim. The inspection purported to show Rojas continued to drive her car after she noticed problems with the transmission, thus violating the terms of Gateway's warranty. Gateway claims it relied on this inspection to deny Rojas's claim. Because the report

was hearsay, the court admitted it into evidence for the limited purpose of showing Gateway's state of mind in denying Rojas's claim. Before submitting the case to the jury, the court reversed its ruling, however, and withdrew the report from evidence because Gateway persisted in trying to argue the truth of the matter asserted in the document: that an inspection had occurred.

Gateway contends the court's withdrawal of the report hobbled its defense against Rojas's allegations that Gateway acted in bad faith. We review the court's evidentiary rulings for abuse of discretion. Gateway does not explain how the court abused its discretion in refusing to admit the report from which Gateway was attempting to make an improper argument based on inadmissible hearsay. But even if the court abused its discretion, Gateway does not show the error was harmful. Rojas alleged multiple instances of Gateway's purported bad faith, and the court instructed the jury on each one. They included Gateway's failure to give Rojas's interests due weight and its unreasonably failing to pay benefits under the policy. Because we do not know on which claim the jury relied in awarding bad faith, Gateway cannot establish that the withdrawal of the report from evidence jury affected the jury's verdict.

4. *Denial of Attorney's Fees Under Consumers Legal Remedies Act*

Appellants sued respondents alleging causes of action for violating the Consumers Legal Remedies Act and the unfair competition law. The court entered judgment for respondents on these claims. Section 1780, subdivision (d) of the CLRA permits a prevailing defendant to recover its attorneys' fees if the plaintiff brought its suit in bad faith. (Civ. Code, § 1780, subd. (d) ["Reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith."]; *Corbett v. Hayworth Dodge Inc.* (2004) 119 Cal.App.4th 915, 924.) Akopyan sought recovery of his fees, and Gateway joined in his request. The court denied respondents' fee requests because it saw no evidence that appellants pursued their claims in bad faith. Gateway contends the court

erred, but Gateway does not acknowledge, let alone discuss, the court's finding of no bad faith, which is a predicate to awarding fees. Accordingly, Gateway's contention fails.

DISPOSITION

The judgment, including the orders granting a new trial on the amount of Rojas's damages for Gateway's bad faith and for punitive damages, is affirmed. Cross appellants to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, J.

WE CONCUR:

COOPER, P. J.

BIGELOW, J.